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MINING ALERT

AUGUST 2010

# POTENTIAL IMPACT OF NEW U.S. DISCLOSURE RULES ON CANADIAN RESOURCE ISSUERS

*By Paul Mingay*

On July 21, 2010, the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "Act"), which reforms the American financial system, became law in the United States. It contains provisions which affect natural resource companies, including Canadian companies which are listed or trade in the U.S. In particular, there are new disclosure requirements relating to:

- payments to governments;
- mine safety; and
- "conflict minerals".

## **Applicability**

The new requirements will generally apply to issuers subject to U.S. reporting requirements. Most Canadian companies qualify as "foreign private issuers" and have somewhat different and less onerous reporting obligations. As noted below, because the Act requires the United States Securities and Exchange Commission to issue new rules or regulations to implement certain of the changes, and because of the way the Act is worded, there is some uncertainty as to how the new requirements will be applied to foreign private issuers. Accordingly, it will be necessary to see how the requirements are finally implemented in order to gauge the final impact on Canadian issuers. A brief outline of the new requirements is set out below:

## **Payments to Governments**

The Act directs the SEC to issue rules by April 17, 2011 requiring resource extraction issuers to include in their annual reports filed with the SEC disclosure regarding payments made to the U.S. and other governments for the purpose of

# MINING ALERT

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the commercial development of oil, natural gas or minerals. The extent of the disclosure is quite detailed, including amounts, currency, what government received the payment and the project involved. The term “payments” includes taxes, royalties, fees, production entitlements and bonuses. The information must be provided in an interactive data format.

## Mine Safety

The Act imposes a requirement upon issuers who operate a coal or other mines to provide disclosure regarding citations for violations of health and safety standards, closure orders, fatalities and other violations. It appears that most of these requirements only apply to mines subject to regulation under the U.S. Federal Mine and Safety Act of 1977, and therefore ownership of mines outside the U.S. would not trigger a new disclosure requirement. The requirement to disclose fatalities, however, does not appear to be limited to U.S. mines.

The Act imposes the requirement to file some of this disclosure in each periodic report and some on Form 8-K. Form 8-K is not a form that foreign private issuers are required to file, however, the SEC may require foreign private issuers to include equivalent disclosure in their Form 20-F or 40-F, something the SEC has done in the past. Accordingly, the exact impact on Canadian issuers with mines subject to U.S. regulation remains to be seen.

## Conflict Minerals

The provisions around conflict minerals are aimed at the conflict in the Democratic Republic of the Congo and require disclosure in relation to trade in minerals used to finance the conflict. “Conflict minerals” are gold, coltan, cassiterite, wolframite, derivatives thereof and other minerals determined by the U.S. Secretary of State to be financing conflict in the Congo or an adjoining country. The Act directs the SEC to adopt regulations by April 17, 2011 requiring disclosure by issuers for whom conflict minerals are necessary to the functionality or production of a product manufactured by the issuer. The disclosure must cover whether the minerals originated in the Congo (or an adjoining country) and the measures taken to exercise due diligence on the source and chain of custody. These measures must include an independent private sector audit and the disclosure must also be posted on the issuer’s website.

Again, while it will be necessary to see the final regulations, this additional disclosure requirement may also affect Canadian foreign private issuers.

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If you have any questions about these or other mining law matters, please contact any member of our Mining Group.

## Mining Group

### Our Mining Group is chaired by:

Fred R. Pletcher (Vancouver)

604 640-4245

[fletcher@blgcanada.com](mailto:fletcher@blgcanada.com)

### Our Mining Group regional leaders are:

#### CALGARY

Michael Perkins

403 232-9410

[mperkins@blgcanada.com](mailto:mperkins@blgcanada.com)

#### VANCOUVER

Fred R. Pletcher

604 640-4245

[fletcher@blgcanada.com](mailto:fletcher@blgcanada.com)

#### MONTRÉAL

Peter G. Pamel

514 954-3169

[ppamel@blgcanada.com](mailto:ppamel@blgcanada.com)

#### TORONTO

Philippe Tardif

416 367-6060

[ptardif@blgcanada.com](mailto:ptardif@blgcanada.com)

*We would like to gratefully acknowledge the assistance of Skadden, Arps, Slate, Meagher & Flom LLP in the preparation of this article.*

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BORDEN LADNER GERVAIS LLP  
MINING GROUP

**Borden Ladner Gervais LLP**  
Lawyers • Patent &  
Trade-mark Agents

#### Calgary

1000 Canterra Tower  
400 Third Avenue S.W.  
Calgary, Alberta, Canada  
T2P 4H2  
tel: 403 232-9500  
fax: 403 266-1395

#### Montréal

1000 de La Gauchetière  
Street West  
Suite 900, Montréal,  
Québec, Canada H3B 5H4  
tel: 514 879-1212  
fax: 514 954-1905

#### Ottawa

World Exchange Plaza  
100 Queen St., Suite 1100  
Ottawa, Ontario, Canada  
K1P 1J9  
tel: 613 237-5160  
1-800-661-4237  
legal fax: 613 230-8842  
IP fax: 613 787-3558

#### Toronto

Scotia Plaza,  
40 King Street West  
Toronto, Ontario, Canada  
M5H 3Y4  
tel: 416 367-6000  
fax: 416 367-6749

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street,  
P.O. Box 48600  
Vancouver, British Columbia,  
Canada V7X 1T2  
tel: 604 687-5744  
fax: 604 687-1415

#### Waterloo Region

Waterloo City Centre  
100 Regina Street South,  
Suite 220  
Waterloo, Ontario,  
Canada N2J 4P9  
tel: 519 579-5600  
fax: 519 579-2725  
IP fax: 519 741-9149

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